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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2014 FEB -4 PM 2: 33

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6660
DATE OF COMPLAINT: October 9, 2012
DATE OF NOTIFICATION: October 12, 2012
DATE OF LAST RESPONSE: November 13, 2012
DATE ACTIVATED: January 4, 2013

ELECTION CYCLE: 2012
SOL: March 8, 2017

COMPLAINANT:

Charles M. Webster

RESPONDENTS:

Angus King for U.S. Senate Campaign and
J. Maurice Bisson in his official capacity as
treasurer
Angus King
Americans Elect
Eliot Cutler

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431
2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 437g
2 U.S.C. § 441a(a)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.5
11 C.F.R. § 109.3
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges two violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). First, it alleges that Americans Elect, a 501(c)(4) organization, should have registered and reported with the Commission as a political committee because it

1 aired more than \$500,000 in television advertisements expressly advocating the election of
2 Angus King, an independent candidate in 2012 for a U.S. Senate seat in Maine. Second, it
3 alleges that one of those advertisements was coordinated between Americans Elect and King's
4 campaign committee because Eliot Cutler held positions with both Americans Elect — where he
5 was a member of the board — and the campaign committee — where he served as one of the
6 campaign's statewide chairmen. Compl. at 3-5 (Oct. 9, 2012). The Complaint alleges that the
7 costs associated with that advertisement therefore constitute a prohibited in-kind contribution
8 from Americans Elect to King and his campaign committee, Angus King for Senate, and J.
9 Maurice Bisson in his official capacity as treasurer (the "Committee").

10 Regarding the allegation that Americans Elect failed to register and report as a political
11 committee, Americans Elect asserts that it lacks the requisite major purpose of a political
12 committee — namely, the nomination or election of a clearly identified federal candidate.
13 Americans Elect Resp. at 6 (Nov. 13, 2012). It asserts that it spent more than 96% of its funds
14 on developing an alternative nominating process and obtaining ballot access and only a small
15 percentage of its funds were devoted to making independent expenditures. *Id.* As to the
16 coordination allegation, all Respondents deny that the challenged advertisement of Americans
17 Elect supporting King resulted from any coordinated activity, providing several affidavits in
18 support. *See id.*; Angus King and Committee Joint Resp. (Oct. 29, 2012) (the "Joint Resp.");
19 Cutler Resp. (Oct. 29, 2012).

20 As discussed below, the available information indicates that the activities of Americans
21 Elect do not support a finding that the organization's major purpose was the nomination and
22 election of particular federal candidates. Accordingly, we recommend that the Commission find

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1 no reason to believe that Americans Elect violated 2 U.S.C. §§ 432, 433, and 434 by failing to
2 organize, register, and report as a political committee.

3 We further conclude that the record does not support a reason to believe finding that the
4 conduct prong of the Commission's coordinated communication regulations was met. We
5 therefore recommend that the Commission find no reason to believe that any Respondent made
6 or accepted or received a prohibited corporate in-kind contribution in violation of 2 U.S.C.
7 § 441b(a), and close the file.

8 II. FACTUAL AND LEGAL ANALYSIS

9 A. Americans Elect is not a Political Committee

10 1. Factual Background

11 a. Activities of Americans Elect Through June 26, 2012

12 Americans Elect was incorporated in April 2010 under the laws of the District of
13 Columbia and is a non-profit social welfare organization under section 501(c)(4) of the Internal
14 Revenue Code. Compl. at 3. *See generally*, Americans Elect Mission Report, Summary of
15 Operations March 2, 2010 – May 17, 2012, at 71 (2012) (the "Mission Report") (audited
16 financial statements). Americans Elect's stated goal on its website was to provide an alternative
17 to the traditional two-party presidential elections system. *See* [http://web.archive.org/web/](http://web.archive.org/web/20120425123117/http://www.americansselect.org/about)
18 [20120425123117/http://www.americansselect.org/about](http://web.archive.org/web/20120425123117/http://www.americansselect.org/about). In furtherance of that purpose, it sought
19 to create an internet-based nominating system to select a presidential and vice-presidential
20 candidate, independent of the candidate's political party affiliation, and to obtain ballot access
21
22
23

1 for those nominees in all 50 states. Mission Rpt. at 13-16;¹ Compl., Ex. E at 2, 27 (Americans
2 Elect 2010 IRS Form 990).²

3 Americans Elect devised a nominating system comprised of three planned online
4 caucuses with a convention scheduled on June 12, 2012. Mission Rpt. at 52, 55-61. To advance
5 to the first caucus, a candidate had to obtain a sufficient number of "clicks" for each of ten states
6 from the verified delegates of Americans Elect.³ *Id.* During the 2012 election contest, no
7 candidate achieved adequate support to qualify for the first online caucus, scheduled May 8,
8 2012, and Americans Elect rescheduled it for May 15, 2012. See Jonathan Tilove, *Buddy*
9 *Roemer Comes up Short in Americans Elect Online Vote*, TIMES-PICAYUNE (May 4, 2012),
10 *available at*

11 http://www.nola.com/politics/index.ssf/2012/05/buddy_roemer_still_short_for_a.html. No
12 candidate met the qualifying criteria for inclusion by that date either. See Statement by
13 Americans Elect CEO Kalil Byrd (May 15, 2013), *available at* [http://web.archive.org/web/](http://web.archive.org/web/20120519132001/http://www.americansselect.org/news/5-2012/statement-americans-elect-ceo-)
14 [20120519132001/http://www.americansselect.org/news/5-2012/statement-americans-elect-ceo-](http://web.archive.org/web/20120519132001/http://www.americansselect.org/news/5-2012/statement-americans-elect-ceo-)

¹ Americans Elect confirms that the Mission Report is a document it created and released publicly in connection with its operations. See e-mail from Michael R. Hackett, Esq., Proskauer, to Roy Q. Luckett, Att'y, FEC (Apr. 3, 2013, 10:13 AM).

² Americans Elect provided the following description of its organizational mission in its 2010 Form 990 filing with the IRS: "The purpose of Americans Elect is to encourage civic engagement by developing a nonpartisan process for the American people, using an internet-based convention, directly to nominate qualified persons for president and vice president of the United States of America in the 2012 election. Our mission is to empower Americans to choose a presidential ticket and formulate an issues platform that is independent of the partisan interests of either major party. Americans Elect will encourage civic engagement by the American people and educate voters about their exercise of direct democracy. Americans Elect does not and will not support or oppose any candidate or candidate committee." Compl., Ex. at 2, 27.

³ Americans Elect provided that any registered voters who signed up through the Americans Elect website could serve as a delegate. Delegates were permitted to draft and support any candidate, including those not seeking federal office. Americans Elect also established a process to verify that its voting delegates were *bona fide* registered voters. See Jonathan Tilove, *Buddy Roemer Still Short on 'Clicks': Americans Elect Will Have to Delay Vote Again*, TIMES-PICAYUNE (May 9, 2012), *available at* http://www.nola.com/politics/index.ssf/2012/05/buddy_roemer_still_short_on_clicks.html.

1 kahlil-byrd. Americans Elect thereafter issued a statement acknowledging that “no candidate
2 achieved the national support threshold required to enter the Americans Elect Online Convention
3 in June” and consequently, “[t]he primary process for the Americans Elect nomination has come
4 to an end.” *See* A Statement from Americans Elect (May 17, 2012), *available at* [http://](http://web.archive.org/web/20120520033233/http://www.americansselect.org/news/5-2012/release)
5 web.archive.org/web/20120520033233/http://www.americansselect.org/news/5-2012/release.

6 Despite the failure to identify a candidate that satisfied its nomination requirements,
7 Americans Elect indicated that it would “continu[e] the Americans Elect mission of creating
8 more choice in our political system, giving candidates unaffiliated with the nominating process
9 of either major party an authentic way to run for office and giving the American people a greater
10 voice in our political process.” *Id.* According to its Response, after concluding its online
11 nomination effort, the Americans Elect board “began a process to wind down the organization,
12 withdraw any ballot access where possible, and planned ultimately to dissolve by the end of the
13 year.” Americans Elect Resp. at 3; Aff. of Kahlil Byrd ¶ 4 (Nov. 12, 2012). Specifically, on
14 June 26, 2012, the Board of Directors of Americans Elect voted in favor of a resolution to
15 dissolve the organization and directed its corporate officers to implement a “dissolution plan.”
16 Americans Elect Resp., Ex. B. That resolution also accepted the resignations of seventeen
17 members of Americans Elect, including Eliot Cutler and four other outside Directors. *Id.*
18 Cutler’s resignation letter cited as its basis the anticipated dissolution of Americans Elect and the
19 termination of its online convention. Americans Elect Resp., Ex. A. Americans Elect also
20 dissolved several internal committees, as well as a subcommittee that focused on overseeing and
21 approving implementation of the Presidential Nomination Process Plan. Americans Elect Resp.,
22 Ex. B.

Concerning its financial activity, Americans Elect represents that it had an operating budget in excess of \$35 million. Americans Elect Resp. at 2. According to the audited financial statements attached to its Mission Report, between the time it was formed in April 2010 and the end of 2011, Americans Elect had spent or obligated over \$33 million, including \$11,316,047 for ballot access expenses, \$4,930,908 for technology development, \$3,637,603 for delegate planning, recruitment and engagement, \$2,942,377 for marketing and paid media, and \$11,236,290 for policy and outreach, management, fundraising, and refunds for 2010 contributions. Mission Rpt. at 69. At the same time, Americans Elect had incurred debts of \$28,697,744 by the end of 2011. *Id.* at 71. An August 28, 2012, independent financial statement of the auditor for Americans Elect concerning the organization's 2011 fiscal year, attached as Exhibit E to the Mission Report, stated that, although the statement was prepared assuming Americans Elect would remain a going concern, the organization's "recurring losses from operations, lack of funding and its inability to repay its loans payable raise substantial doubt about its ability to continue as a going concern." *Id.*, Append. E at 1.

b. The Activities of Americans Elect Following its June 26, 2012, Resolution to Dissolve

After paying certain vendors and lessors, Mission Rpt. at 73, on August 6, 2012, the remaining Directors of Americans Elect authorized the organization "to make independent expenditures in connection with federal elections in the State of Maine." Americans Elect Resp., Ex. C.⁴ From August 8, 2012, to August 20, 2012, Americans Elect entered into vendor services agreements to create television advertisements expressly advocating King's election. Byrd Aff.

⁴ Aside from its payment of certain vendors and lessors in relation to its prior online nomination efforts, we are aware of no other activity by Americans Elect between the June 26, 2012, resolution to dissolve and the August 6, 2012, resolution of the Board to produce advertisements expressly advocating King's election.

1 ¶ 11. According to Americans Elect, “[t]he Maine race presented Americans Elect with an
2 opportunity to test the premise of its assumptions regarding the electability of an unaligned
3 candidate at the federal level.” Americans Elect Resp. at 3.

4 Americans Elect’s filings with the Commission reflect that, from October 5, 2012,
5 through October 31, 2012, the organization made numerous independent expenditures supporting
6 King and opposing his opponent, Charles Summers, totaling \$1,349,297. *See* Americans Elect,
7 FEC Form 5 (Jan. 30, 2013).⁵ In its Response, Americans Elect contends that it was not required
8 to register and report as a political committee because it was not formed and did not act with the
9 major purpose of electing King or any other clearly identified federal candidate. Americans
10 Elect Resp. at 6. Americans Elect states that more than 96% of its more than \$35 million
11 operating budget was spent in relation to its development of an alternative online nomination
12 platform and in securing ballot access in the 50 states, and that the organization’s independent
13 expenditures accounted for less than 4% of its spending. Americans Elect Resp. at 2, 6; Byrd
14 Aff. ¶¶ 2, 3, 12.

15 After the election, Americans Elect appeared to remain a going concern. Its website
16 stated: “See you in 2013! We look forward to bringing greater choice and innovation to federal,
17 state and local elections to come.” *See* <http://www.americansselect.org/> (last visited Feb. 4,
18 2014).

⁵ It appears that Americans Elect funded those independent expenditures with \$1,750,000 in contributions received between August 8, 2012, and October 4, 2012, from Board-member Peter Ackerman (\$500,000), Mayor Michael Bloomberg (\$500,000), and John Burbank of Passport Capital LLC (\$750,000). *See* Americans Elect, FEC Form 5 at 2-3 (Jan. 30, 2013).

2. Legal Analysis

a. The Test for Political Committee Status

The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that defining political committee status "only in terms of the annual amount of 'contributions' and 'expenditures'" might be overbroad, reaching "groups engaged purely in issue discussion." *Id.* at 79. To cure that infirmity, the Court concluded that the term "political committee" "need only encompass organizations that are under the control of a candidate or the *major purpose of which is the nomination or election of a candidate.*" *Id.* (emphasis added). Accordingly, under the statute as thus construed, an organization that is not controlled by a candidate must register as a political committee only if (1) it crosses the \$1,000 threshold and (2) it has as its "major purpose" the nomination or election of federal candidates.

Because Americans Elect made \$1,349,297 in independent expenditures between October 5, 2012 and October 31, 2012, its spending satisfies the statutory threshold for political committee status.⁶ The remaining question is whether Americans Elect's major purpose was the nomination or election of one or more federal candidates. We conclude it was not.

⁶ The statutory threshold may have been met as early as August 2012, when the Board of Americans Elect authorized the organization to make independent expenditures, if the contributions received at that time were solicited or earmarked for independent expenditures on behalf of Angus King. See *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (concluding funds received in response to fundraising solicitations clearly indicating that the funds being sought would be targeted to the election or defeat of clearly identified federal candidates constitute contributions under the Act).

b. Major Purpose

The Commission has adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) ("Supplemental E&J"). Under the Commission's case-by-case approach, the Commission considers the organization's "overall conduct," including its disbursements, activities, and statements. Supplemental E&J at 5597.

From inception, Americans Elect's public statements and organizational documents have represented that the organization was devoted to placing a yet unknown, directly nominated presidential and vice-president candidate on the 2012 ballot in 50 states, not the nomination or election of any clearly identified federal candidates. It also appears that, since its formation in April 2010 until the Board's decision to authorize the organization to make independent expenditures in August 2012,⁷ Americans Elect spent funds solely on this activity.⁸ The D.C. Circuit has ruled that this activity does not constitute the nomination or election of a clearly identified candidate. *See Unity08 v. FEC*, 596 F.3d 861, 868-69 (D.C. Cir. 2010) (holding that organization seeking to hold an online nominating convention without supporting a clearly identified candidate lacks requisite major purpose); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee "contribution limitations did not apply to . . . groups whose activities did not support an existing 'candidate'"

⁷ Although Americans Elect passed a resolution to dissolve its operations on June 26, 2012, and substantially reduced the organization's activities and staff, Americans Elect never in fact terminated. It retained a functioning board of directors and continued to operate in the same name and subject to the same corporate formalities, as demonstrated by its resolution to make independent expenditures and its activities in connection with that decision through October 2012.

⁸ It appears that between April 8, 2010, and August 12, 2012, Americans Elect's disbursements totaled \$38,200,000. Mission Rpt. at 37.

1 and finding Commission's subpoena was overly intrusive where directed toward "draft" group
2 lacking a "candidate" to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996)
3 (holding that a group's support of a "farm team" of future potential federal candidates at the state
4 and local level did not make it a political committee under the Act). Although Americans Elect
5 has reported making \$1,349,297 in independent expenditures in October 2012, the spending on
6 this federal campaign activity accounts for less than 4% of Americans Elect's total operating
7 budget and approximately 24.6% of its spending in calendar year 2012.⁹ Americans Elect's
8 disbursements, activities, and statements, therefore, indicate that the organization's major
9 purpose was not the nomination or election of federal candidates.¹⁰

10 We therefore recommend that the Commission find no reason to believe that Americans
11 Elect violated 2 U.S.C. §§ 432, 433, and 434 by failing to register and report as a political
12 committee.

⁹ The record indicates that Americans Elect's disbursements totaled \$30,668,072 in calendar year 2011 and \$3,395,153 in 2010. Mission Rept., Append. F at 3. Americans Elect's response does not indicate how much the group spent specifically during the 2012 calendar year. Given that Americans Elect spent \$38,200,000 from April 2010 to August 2012, however, it appears that the organization disbursed approximately \$4,136,775 between January 1, 2012, and August 12, 2012 on its online nomination process and ballot access. Therefore, the available information demonstrates that Americans Elect spent approximately \$5,486,072 in 2012, and of that total, only \$1,349,297 (or 24.6%) was for the nomination or election of clearly identified federal candidates.

This Office has previously explained that approaching political committee status determinations based on spending in a calendar year would provide the firmest statutory footing for the Commission's major purpose determination and is consistent with the Act's plain language. 2 U.S.C. § 431(4); *see, e.g.*, First Gen. Counsel's Rpt. at 24-26, MUR 6396 (Crossroads GPS). Thus, whether Americans Elect had the requisite major purpose should be determined by reference to its activities during the 2012 calendar year. Regardless, even under the approach recently advocated by three Commissioners in MUR 6081 (American Issues Project) and in MUR 6396 (Crossroads GPS) — who would consider [in certain cases] an organization's spending over its entire active lifecycle — we would arrive at the same conclusion here, as the amount Americans Elect spent in relation to the nomination or election of candidates would represent less than 4% of its overall spending since the inception of the organization. *See* Statement of Reasons, Vice Chair McGahn and Comm'rs. Hunter and Petersen at 13-14, MUR 6081 (Crossroads GPS). Statement of Reasons, Chair Goodman and Comm'rs. Hunter and Petersen at 20-21, 24, MUR 6396 (Crossroads GPS).

¹⁰ In arriving at this conclusion, we do not take the position that only the independent expenditures of an organization may indicate that its major purpose is the nomination or election of particular candidates; rather, in this case independent expenditures represent the only apparent spending of Americans Elect related to the nomination or election of a particular candidate.

B. The Television Advertisement Supporting King's Election was not a Coordinated Communication

I. Factual Background

The Complaint also alleges that Americans Elect coordinated with King and the Committee a television advertisement supporting King's election. Compl. at 2-5. This allegation was premised on the claim that Eliot Cutler served concurrent roles for both Americans Elect and the Committee when the advertisement was created, produced, and broadcast. *Id.*; see also Compl., Ex. B (text of advertisement); Compl., Ex. D (Maggie Haberman, *Americans Elect Airls \$500K in Maine Air Time in Support of King (Updated)*, POLITICO (Oct. 5, 2012), available at <http://www.politico.com/blogs/burns-haberman/2012/10/americans-elect-air-k-in-maine-air-time-in-support-137631.html>). The Complaint alleges that beginning in December 2011, and continuing through the October 5, 2012, date of the Complaint, Cutler served as a member of Americans Elect's Board of Directors. Compl. at 2. On March 8, 2012, the Committee announced the appointment of Cutler as one of the campaign's nine statewide chairs. *Id.* In view of Cutler's alleged dual roles, the Complaint concludes that "[i]t is inconceivable that the pro-King Americans Elect communications were made without substantial discussions, material involvement, or at the request or suggestion of Cutler — an agent of the King campaign." Compl. at 5.

In response, Cutler represents in a sworn affidavit that he resigned from the board of Americans Elect on June 26, 2012, and attaches a copy of his resignation letter. Aff. of Eliot R. Cutler ¶¶ 2, 7, (Oct. 27, 2012); Cutler Resp., Ex. A. He further explains that in late April 2012, he "agreed to serve as one of nine volunteer and largely honorary chairs" for the Committee, and that he also served the Committee as a volunteer fundraiser beginning at the same time. *Id.* ¶ 5. Concerning the Complaint's inference that he was a conduit for communications between the

1 Committee and Americans Elect, Cutler represents that he "had no conversations at any time"
2 with anyone "at or in any way connected with Americans Elect regarding the plans, projects,
3 activities or needs of the King Campaign or that was material to the creation, production or
4 distribution of the TV ads"; and that he "never discussed with anyone affiliated in any way with
5 Americans Elect the content, intended audience, means or mode of communication, specific
6 media outlet used, time or frequency or size or prominence of the TV ads." *Id.* ¶ 10. He also
7 represents that he "never had any conversations or communications with anyone affiliated with
8 Americans Elect in any way suggesting or relating to any assent of the [Committee] to outside
9 assistance, or with regard to any of the activities listed in 11 C.F.R. § 109.3(b)(1) through (6) or
10 that meets any of the content standards set forth in 11 C.F.R. § 109.21(c)." *Id.*

11 Cutler states that he spoke to Byrd, the then-CEO of Americans Elect, on May 24 and
12 June 11, 2012, concerning the future of Americans Elect. Cutler Aff. ¶ 6. As a result of these
13 conversations, Cutler believed that Americans Elect officers were engaged in on-going
14 discussions about what Americans Elect would do next, including possibly supporting state and
15 local candidates in 2012, 2013, and 2014 and making adjustments for the 2016 presidential
16 election. *Id.* Cutler also noted that Byrd made some "very general references to Angus King's
17 candidacy for the U.S. Senate." *Id.* But Cutler avers that he never discussed "with Mr. Byrd or
18 anyone else affiliated in any way with Americans Elect" any political campaign activities that
19 Americans Elect or its officers or staff might undertake. *Id.*

20 According to the Americans Elect Response, "Cutler had left the leadership of Americans
21 Elect nearly one and a half months before Americans Elect first considered making an
22 independent expenditure" supporting King. Americans Elect Resp. at 4-5. Americans Elect also
23 submitted an affidavit of Byrd, which represents that, after resigning, Cutler "had no further

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1 management role or involvement with Americans Elect.” Byrd Aff. ¶ 6; *see also id.*, Ex. A
2 (resignation letter of Eliot Cutler dated June 26, 2012), Ex. B (resolution of June 26, 2012,
3 accepting Cutler resignation).¹¹ Further, Americans Elect maintains that it engaged in best
4 practices to avoid coordination by informing and requiring directors and vendors to comply with
5 its non-coordination policy. Americans Elect Resp. at 5, Ex. D (copy of internal legal guidance
6 concerning coordination), Ex. E (copy of Americans Elect policy prohibiting coordination with
7 respect to Maine senatorial election). In his affidavit, Byrd represents that Americans Elect’s
8 expenditures expressly advocating the election of King were not made at the request or
9 suggestion of the King campaign or its agents; the King campaign did not assent to those
10 expenditures; the King campaign and its agents were not involved in the decision to make the
11 expenditures; and the expenditures were not made after any substantial discussion between
12 Americans Elect, the King campaign, or their respective agents regarding the plans, projects,
13 activities, or needs of King that was material to the creation, production, or the distribution of the
14 television advertisements. *See* Byrd Aff. ¶ 13.

15 The Joint Response of King and the Committee notes that, prior to the filing of the
16 Complaint, the press reported that Cutler had resigned from Americans Elect in June 2012 and
17 that he claimed to be unaware Americans Elect had paid for the advertisement. *See* Joint Resp.
18 at 2-4, Ex. 2 (press articles). With the Joint Response, King and the Committee also submitted
19 an affidavit of Kathryn Rand, the Committee’s Campaign Manager. Rand denies that she, or to
20 her knowledge any other King campaign official, gave Cutler or any other individual express or
21 implied authority to contact Americans Elect to undertake any activities, discussions, or be
22 materially involved in any decisions regarding the creation, production, or distribution of the

¹¹ Byrd states that he was at all relevant times the CEO of Americans Elect. Byrd Aff. ¶ 1.

1 television advertisement at issue. *Aff. of Kathryn Rand* ¶¶ 5-7 (Oct. 26, 2012) (attached as
2 Exhibit 3 to the Joint Response); *see also* 11 C.F.R. § 109.3(b).

3 2. Legal Analysis

4 The Act prohibits corporations from making contributions, including in-kind
5 contributions, to federal candidates and their authorized committees. 2 U.S.C. § 441b(a).
6 Officers and directors of corporations also may not consent to any contribution prohibited by
7 section 441b(a). Correspondingly, federal candidates and their authorized committees may not
8 knowingly accept a corporate contribution. *Id.*

Americans Elect's costs in making the television advertisement supporting King's election would constitute a prohibited corporate in-kind contribution from Americans Elect to King if the advertisement was a "coordinated communication." 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.21(b). Commission regulations provide a three-prong test to determine if a communication is a coordinated communication. 11 C.F.R. § 109.21(a). First, the communication must be paid for, in whole or in part, by a person other than the candidate or authorized committee (the payment prong). 11 C.F.R. § 109.21(a)(1). Second, the communication must satisfy one of the five content standards (the content prong). 11 C.F.R. § 109.21(a)(2), (c). Third, the communication must satisfy one of the five conduct standards (the conduct prong). 11 C.F.R. § 109.21(a)(3), (d). A payment for a communication satisfying all three prongs of the test is made for the purpose of influencing a federal election, and therefore it is an in-kind contribution.

As Americans Elect concedes, both the payment and content prongs of the Commission's coordinated communication regulation are met here. Americans Elect Resp. at 5. Americans Elect is a third-party responsible for paying to air the advertisement, and the advertisement was a

1 public communication that refers to King, a clearly identified candidate for federal office,
2 broadcast in his jurisdiction within 90 days of the November 6, 2012, general election. *See*
3 11 C.F.R. § 109.21(a)(1), (c)(4)(i).

4 The record does not provide any reason to conclude, however, that the conduct prong is
5 met in this matter. The conduct prong will be satisfied if (1) the communication was created,
6 produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the
7 candidate or his campaign was materially involved in decisions regarding the communication;
8 (3) the communication was created, produced, or distributed after substantial discussions with
9 the campaign or its agents; (4) the parties contracted with or employed a common vendor that
10 used or conveyed material information about the campaign's plans, projects, activities or needs,
11 or used material information gained from past work with the candidate to create, produce, or
12 distribute the communication; (5) the payor employed a former employee or independent
13 contractor of the candidate who used or conveyed material information about the campaign's
14 plans, projects, activities or needs, or used material information gained from past work with the
15 candidate to create, produce, or distribute the communication; or (6) the payor republished
16 campaign material. *See* 11 C.F.R. § 109.21(d).

17 The Complaint bases its coordination allegation entirely on the assertion that Cutler held
18 concurrent positions as a board member of Americans Elect and co-chair of the Committee when
19 the advertisement was created, produced, and broadcast. Although Cutler acknowledges
20 agreeing to act as one of the Committee's nine voluntary chairs and as a voluntary fundraiser
21 prior to his resignation from Americans Elect, there is no information to suggest that Americans
22 Elect was considering making expenditures on behalf of King at that time, and Cutler represents
23 the contrary in his affidavit. Moreover, all of the relevant parties that allegedly would have

1 participated in the coordinated activities have provided factually-specific affidavits from persons
2 with relevant knowledge denying that Cutler either was involved with or was authorized to act as
3 an agent regarding any of the activities that meet the conduct prong in connection with the
4 challenged advertisement. Further, as to the period prior to Cutler's June 26, 2012, resignation,
5 he represents under penalty of perjury that he "never" discussed the relevant advertisement with
6 Americans Elect or the Committee "at any time." Cutler Aff. ¶ 10.¹² Moreover, both Americans
7 Elect and the Committee also deny, with affidavits in support, that they or their agents engaged
8 in any such activities.

9 As such, the record here does not reasonably suggest that the parties engaged in any
10 activity that would satisfy the conduct prong of the Commission's coordination regulation with
11 respect to the challenged advertisement. Accordingly, we recommend that the Commission find
12 no reason to believe that any Respondent violated 2 U.S.C. § 441b(a) by making or knowingly
13 accepting or receiving a prohibited corporate in-kind contribution in the form of a coordinated
14 communication, and close the file.

15 III. RECOMMENDATIONS

- 16 1. Find no reason to believe that Americans Elect violated 2 U.S.C. §§ 432, 433, and
17 434;
- 18 2. Find no reason to believe that Americans Elect, Eliot Cutler, Angus King, and Angus
19 King for U.S. Senate Campaign and J. Maurice Bisson in his official capacity as
20 treasurer violated 2 U.S.C. § 441b(a);
- 21 3. Approve the attached Factual and Legal Analyses;
- 22 4. Approve the appropriate letters; and
- 23
- 24

¹² Cutler also waived in writing any confidentiality obligation concerning his response under 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A). Cutler Resp. at 4.

Date _____

2/9/14

~~Ray~~ Q. Lockett
Attorney